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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 591.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

1. In **Prince v. United States**, 352 U. S. 322, this Court set forth its policy "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." The Government has not demonstrated any intent upon the part of Congress to fragmentate the two statutes here involved. Rather, it is more likely that Congress by these sections only intended to facilitate the conviction of persons in each stage of the illegal drug trade.

The Government's attempt to find independent evidence to support two offenses is fallacious. It argues:

> "Actually, in this case there was adequate proof of separate acts. The defendants were in actual receipt and in the process of concealing the heroin in violation of 21 U. S. C. 174, when they were apprehended. The nature of their activities was such as to indicate that they knew it had been imported contrary to law. In view of the absence of stamps, there was also justification for concluding that an illegal act of purchase, separate from the receipt and concealment, had occurred."

This endeavor to find proof of separate acts illustrates that the two offenses charged were actually merged in the instant case. The statement that defendants were in actual receipt is equivalent to saying defendants were in possession since possession implies receipt. There is nothing in the evidence to indicate when and where the narcotic drug was received. The argument that defendants were in the process of concealing the heroin is merely a statement that in any possession there is some concealment from others. The contention that the nature of their activities indicated that they knew the drug had been imported contrary to law means no more than that intent, knowledge or state of mind is generally shown from all the circumstances in the evidence. The argument that the absence of stamps was justification for concluding that an illegal act of purchase had occurred is equivalent to inferring an illegal purchase from the possession of the drug. It is significant that the Court below did not attempt to find proof of separate acts.

In **Blockberger v. United States**, 284 U. S. 299, this Court approved consecutive sentences on counts which charged a sale of narcotics not from the original stamped package and not in pursuance of a written order of the

purchaser. There was no merger of the two offenses in the evidence which showed an omission to comply with the different requirements of two statutes in the single sale. It was also possible for a sale to comply with the requirements of one statute alone and yet be in violation of the other statute. But, under the statutes involved in the instant case, every person charged with purchasing narcotic drugs other than from the original stamped package may always be found guilty of receiving and concealing the drug knowing that it had been imported contrary to law. The government makes a prima facie case under both sections by merely showing possession. The intent of Congress to facilitate the conviction of persons involved in each stage of the illegal drug traffic is made a means of double punishment. This case goes further than **Gore v. United States**, D. C. Cir., 244 F. (2d) 763, because that case is limited to matters which may be raised by collateral attack.

2. The instructions of the trial court merged the two offenses and this merger eliminated the right to impose consecutive sentences whether or not petitioner excepted to the charge. It is equivalent to a Court's requirement that the Government elect which of two counts it intends to present to the jury and the Government should have objected if it wished to keep the possibility of consecutive sentences alive. We concede that, if the sentences had been concurrent, petitioner may have waived his right to complain in this regard by failing to except to the charge. But, the imposition of consecutive sentences made either the merger or the sentence fundamental error since under those circumstances, the finding of an additional fact distinguishing the counts was the most essential ingredient which should have been submitted to the jury.

The other errors in the charge are adequately covered in the petition. They were fundamental in that the jury was not submitted the essential ingredients of the offenses

charged. These instructions are subject to review in the absence of exception. **Screws v. United States**, 325 U. S. 91. Furthermore, the court below reviewed the errors here urged.

CONCLUSION.

For the reasons set out above and those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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